**V. New legal developments have underscored the importance of the Third Circuit's error.**

Finally, Brinson argues that the circumstances in this case are "not likely to recur" and the issue is not worthy of certiorari. Response at 32-35. He insists that the legal landscape has changed under Mayle and Rhines, and that similarly situated habeas petitioners will no longer be in danger of losing their chance at federal review when they go back to state court to exhaust new claims. But the question here – whether habeas petitioners must litigate with diligence when they return to state court – is just as important now as ever, and in fact these recent cases clearly support the request for *certiorari*.

This Court held in Rhines that, under some narrow circumstances, federal habeas petitioners are entitled to a stay of federal proceedings (rather than a dismissal) as they attempt to exhaust new claims in state court. But even under Rhines, stays are generally disfavored; district courts will still dismiss many habeas petitions as "mixed" (that is, containing both exhausted and unexhausted claims) and inevitably some of these courts will later second guess themselves. In such cases, the petitioner will still have to show that he acted diligently to exhaust his claims despite the district court's earlier "mistake," the very issue explicitly avoided by the

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and the Commonwealth both discussed the state deadline at length before the 1997 dismissal, and this deadline contains a 60-day window for claims based on previously undiscoverable facts. While the district court opined that Brinson could meet this exception, no one suggested that he could do so forever. It was Brinson's responsibility to return to state court in a timely fashion, or at least to act diligently and *try* to comply as best he could.

Third Circuit here. More importantly – and the Commonwealth discussed this at length in the Petition – under Rhines, even petitioners who obtain a federal stay are obligated to act with diligence as they return to state court, or risk eventual dismissal. 125 S. Ct. at 1535. Thus, as the Commonwealth explained in its Petition, Rhines is an important new development which undermines the "blank check" analysis of the court below.

Brinson's reliance on Mayle is even more puzzling. There, this Court explained that prisoners cannot amend their federal habeas petitions to include new facts or law once the one-year AEDPA deadline has passed. 125 S. Ct. at 2574-75. Thus, Mayle underscored the importance of the deadline, rather than the contrary. Furthermore, the holding in Mayle was limited to amendments to properly filed habeas petitions, rather than new petitions (like Brinson's). Where an earlier petition has been *dismissed*, and the AEDPA deadline has passed, Mayle does not remotely suggest that there need be no diligence analysis.[9]

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[9] Brinson also seems to suggest that, if Mayle had been the law in 1997, he would not have had to go back to state court at all. Response at 33-34. But Mayle did not purport to change exhaustion analysis. The fact remains that Brinson's allegations about his prosecutor's videotape were new; the state court was the proper place for brining such a claim in the first instance; other petitioners brought such new claims in state court; and Brinson could have done so, too, if he had not waited too long.

## CONCLUSION

For the reasons set forth above, as well as for the reasons explained in the Petition, petitioners respectfully request that this Court grant the Petition for Writ of *Certiorari*.

Respectfully submitted,

THOMAS W. DOLGENOS
Chief, Federal Litigation
RONALD EISENBERG
*(Counsel of Record)*
Deputy District Attorney
ROBERT M. FALIN
Assistant District Attorney
ARNOLD H. GORDON
First Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District
Attorney's Office
1421 Arch Street
Philadelphia, PA
19102
(215) 686-5700